No. 91-729

In The

Supreme Court of the United States

October Term, 1991

CATHERINE JEAN GARZIANO, LOREN GREGORY BROYLES and RAYMUNDO RODRIGUEZ, JR.,

Petitioners,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole issue is whether in the State of California the defense of necessity, available to justify conduct otherwise considered a crime, can be denied if the conduct is to block passage to an abortion clinic because the State of California holds that as a matter of law (no matter the term of pregnancy) abortion cannot be found to be and no evidence is permitted to prove that abortion is a "significant evil," an element that the defendants must prove for the defense of necessity to justify such conduct in a particular case.

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Petitioners, CATHERINE JEAN GARZIANO, LOREN GREGORY BROYLES and RAYMUNDO RODRIGUEZ, JR., respectfully pray that a writ of certiorari issue to review the opinion of the California Court of Appeal which overturned the Municipal Court's holding that the defendants had presented sufficient evidence for the jury to decide whether conduct which would otherwise constitute an offense is justified, commonly called the defense of necessity. The California Court of Appeal held that abortion is not and cannot be held to be a "significant evil," one of the six circumstances defendants have the burden to prove to sustain the defense of necessity,

and therefore refused to review all errors defendants claimed: (1) jury voir dire, (2) denial of proffered evidence, (3) erroneous and prejudicial argument of the District Attorney, and (4) erroneous jury instructions – all related to justification through the defense of necessity.

OPINIONS BELOW

The citation of the opinion of which review is sought in this Court is *People v. Garziano* (1991) 230 Cal.App.3d 241.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1257(3) on the ground that their due process rights to present a defense under the fifth, sixth and fourteenth amendments to the U.S. Constitution were violated.

The California Court of Appeal entered its order rejecting petitioners' position on appeal on May 17, 1991.

The California Supreme Court denied a hearing in this case on August 1, 1991 (APPENDIX C, APP. 16). The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V: " . . . nor be deprived of . . . liberty, or property, without due process of law . . . "

United States Constitution, Amendment XIV, section 1: " . . . nor shall any State deprive any person of . . . liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

On or about July 6, 1989, the defendants were arrested on the charges of obstruction of a thoroughfare to an abortion clinic in Ventura, California, in violation of California Penal Code Section 647c and of refusal to disperse in violation of California Penal Code section 416, to which charges the defendants pleaded not guilty and were assigned for trial by jury, which concluded on September 22, 1989. During the trial the District Attorney made various motions to preclude the defense of necessity based upon the holdings of *Roe v. Wade* (1973) 410 U.S. 113 and *Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52. The motions were all denied, and the defense of necessity was submitted to the jury. The jury found the defendants guilty of both counts, and the defendants were sentenced on September 23, 1989, by the trial judge as follows:

As to defendants CATHERINE JEAN GARZIANO and RAYMUNDO RODRIGUEZ, JR., who were willing to accept probation, the term of summary probation of twelve (12) months with a condition that they stay 100

feet away from the Family Planning Medical Clinic on Telegraph Road, Ventura, California, and that they serve ten (10) days on work release starting December 1, 1989, and pay restitution of $275; and as to defendant LOREN GREGORY BROYLES, who refused summary probation, the term of ten (10) days at the Port Hueneme, California jail and ten (10) days work release, a fine of $500, and restitution of $275. Appeal was immediately filed and sentences to jail and work release were stayed pending appeal.

The jury instruction and judge's comments regarding the defense of necessity were read verbatim to the jury as follows:

Jury Instruction re Necessity Defense

Conduct which would otherwise constitute an offense is justified under the following circumstances:

1. The offense must have been committed to prevent a significant evil.

2. There must have been no adequate alternative to the commission of the offense.

3. The harm caused by the offense must not be disproportionate to the harm avoided.

4. The defendant must entertain a good-faith belief that his/her act was necessary to prevent the greater harm.

5. Such belief must be objectively reasonable under all the circumstances.

6. The defendant must not have substantially contributed to the creation of the emergency.

Judge's Comments With Respect to the Defense of Necessity

" . . . The prosecution evidence was pretty straightforward in its recitation of facts to support the elements of the offenses charged. The defense case was pretty clear too, and raised some issues for you to consider.

"Defendants raise the defense of justification, asserting their actions in both trespassing and refusing to disperse were legally necessary as the defense is defined. I told you the six elements of that defense. You have to decide that issue separately for each defendant, on each charge.

"There is a part of one element of the justification defense which I do not think the law adequately defines for you. The first element of the defense requires that the acts of the defendants be necessary to prevent some significant evil. The term 'significant evil' is not otherwise defined anywhere in the law. One side of this case would have me to define it strictly as anything which is against the law; the other side would have me define it broadly as anything which is immoral or against some interest of society. I believe this is a definition, the specific content of which must be left to you, the jury. I will tell you, though, that the defense of justification was created by judges; that judges deal mostly with the specific, written law and are not much given to consideration of metaphysical concepts of morality or societal interests. I personally incline to the view it must refer to preventing a harm which is against the law, which abortion is not.

"Another issue for you to decide is whether the justification defense is applicable to both charges. There are, I think, significant differences, both factual and legal, between the charges. This is particularly so if you analyze the required subjective and objective reasonableness of defendants' beliefs at particular times during the incident.

"It has occurred to me that I ought to instruct you as a matter of law that you may not consider the justification defense on Count 2, the charge of failing to disperse. For the defense to be appropriate on that charge, you have to find it was objectively reasonable to believe that during the brief interval where Velez and LaFata were confronting the defendants one at a time some imminent harm could be prevented; and further, you have to believe the defendants actually and in good faith believed that. To me it doesn't seem reasonable to believe, that at that point further refusal to leave was likely to accomplish anything except an arrest.

"However, as I stated at the beginning of these remarks, I have great respect for, and trust in, the jury system. In fact, I have only commented on the evidence in two other cases in over 100 jury trials. If I removed the justification defense from your consideration on Count 2, it would effectively be removing the only significant issue on that charge from your consideration, and would significantly detract from the jury's independent verdict.

"I do not propose to remove any issues from your independent judgment in this case, even where it seems unlikely to me that the justification defense is factually applicable to Count 2.

> The law is that defendants are entitled to an instruction on their defense, even where the supporting evidence is weak or of doubtful credibility, and I propose to follow the law. What I ask is that you follow the law too, and only convict or acquit if you find it in the law.
>
> "This concludes my personal comments. You are reminded again that they are advisory only, and are not binding on you, and you may reject them or accept them as you wish, in reaching your independent decision on the case."

The Judge's comments to the jury in full are attached as Appendix D (App. 17).

Defendants' appeal to the Appellate Department of the Superior Court of California, County of Ventura, assigned four errors, all having to do with the defense of necessity as follows:

1. IT WAS ERROR ON VOIR DIRE FOR THE TRIAL COURT NOT TO ALLOW APPELLANTS TO INQUIRE OF PROSPECTIVE JURORS AS TO THEIR ATTITUDES OR BELIEFS WITH REGARD TO ABORTIONS, ABORTION PROTESTS, OR AS TO WHEN LIFE BEGINS.

2. IT WAS ERROR FOR THE TRIAL COURT TO DENY ADMISSION OF EVIDENCE APPELLANTS PROFFERED TO PROVE THE ELEMENTS OF THEIR DEFENSE OF "NECESSITY" OR "JUSTIFICATION" INCLUDING (3) VIDEO TAPES CALLED (a) "THE SILENT SCREAM," (b) "THE ECLIPSE OF REASON" AND (c) "MIRACLE OF LIFE"; VARIOUS PHOTOGRAPHIC PORTRAYALS OF DISMEMBERED UNBORN CHILDREN THAT HAD BEEN KILLED BY USUAL ABORTION PROCEDURES BEING USED BY ABORTIONISTS AT THE "VICTIM" ABORTION

CLINIC, AND (d) A TRACT ENTITLED "CHILDREN: THINGS WE THROW AWAY?"

3. THE SECOND AND REBUTTAL ARGUMENT OF THE DISTRICT ATTORNEY WAS ERRONEOUS AND PREJUDICIAL, AND THE FAILURE OF THE TRIAL JUDGE TO CURB THE MISCONDUCT EITHER BY ADMONITION OR ORDERING A MISTRIAL WAS REVERSIBLE ERROR. [The Deputy District Attorney argued that to allow the defense of necessity would justify bombing an abortion clinic, justify breaking mother's legs before they go into an abortion clinic, justify taking whatever means necessary to prevent an abortion, justify Sirhan in the killing of Bobby Kennedy, justify terrorists in bombing airlines.]

4. IT WAS ERROR FOR THE COURT TO GIVE PAGES 29-37 OF THE JURY INSTRUCTIONS, AND IN PARTICULAR TO COMMENT WITH REGARD TO THE ISSUE OF "JURY NULLIFICATION"; DEFINITION OF "SIGNIFICANT EVIL"; AND DEFENSE OF JUSTIFICATION AS TO COUNT 2.

The Appellate Department of the Superior Court of California, County of Ventura, rendered its unpublished opinion on December 28, 1990, a copy of which is attached hereto as APPENDIX A, which holds in part (APP. 1):

> "The United States Supreme Court opinion in *Roe v. Wade*, (1973), 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 and the California Supreme Court predecessor opinion in *People v. Belous* (1969) 71 Cal.2d 954, compel us to hold that the theoretical defense of 'necessity/justification' is not available to the 'abortion clinic trespasser.' "

The Court stated further in the first full paragraph of page 2, (APP. 2) in part:

> "Our duty to follow the decisions of the California Supreme Court [citation omitted] and the decisions of the United States Supreme Court where a federal question is involved [citations omitted] dictates that we do not reach the merits of appellants' contentions and affirm the judgments."

The California Court of Appeal focused on the first prong of the six-prong necessity defense test, that the act charged as criminal must have been done to prevent a **significant evil.** The Appellate Court Opinion proceeds on the assumption that women in California have an unrestricted constitutional right, based on privacy, to abort children at any term of the pregnancy (*Appellate Court Opinion*, pp. 5-6, APPENDIX B (APP. 14)) and finally summarizing: "A pregnant woman's decision to exercise her right [of privacy, which allows abortion] under the constitutions of the United States and of the State of California to terminate a pregnancy is not and cannot be held to be a 'significant evil' " (*Appellate Court Opinion*, p. 7, APPENDIX B (APP. 15)).

The Court of Appeal's opinion goes too far in that it does not take into account California's right to proscribe abortion when this state's important and legitimate interest in potential life becomes compelling at the point of viability of the unborn. The court's opinion does not take into account that the law on abortion in California is that it is illegal unless it comes under an exception as to nonviable fetuses or necessity to preserve the life or health of the mother.

LEGALITY OF ABORTION IN CALIFORNIA

"The proscription against all abortions after the 20th week of pregnancy in the last sentence of [*California*] *Health and Safety Code* Section 25953 in the Therapeutic Abortion Act is constitutionally enforceable except as to abortions of nonviable fetuses and abortions necessary to preserve the life or health of the mother."

California Attorney General's Opinions, No. 82-313 65 Ops.Cal.Atty.Gen. 261 (1982)

This opinion was rendered after *Roe v. Wade* (1973) 410 U.S. 113 but before *Webster v. Reproductive Health Serv.* (1989) 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040.

While *Roe v. Wade* set the stage for abortion on demand as a method of birth control if the fetus is not viable, the court also made clear that "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at **viability**. . . . If the State is interested in protecting fetal life after **viability**, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother" (*Roe v. Wade* 410 U.S. 163-164; 35 L.Ed.2d at 183). [Emphasis added.]

Viability, the touchstone of this *Roe v. Wade* quotation, is significant because California can protect fetal life after **viability** as an important and legitimate interest in potential life overridden only when the termination of that potential life is necessary to preserve the life or health of the mother.

Webster v. Reproductive Serv., supra, makes this abundantly clear when it upheld the **viability-testing** provisions of a Missouri Act, which was concerned with promoting the state's interest in potential human life rather than maternal health, that created essentially a presumption of **viability at 20 weeks,** which a physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion (*Webster, supra,* 492 U.S. at 515, 106 L.Ed.2d at 434).

The *Webster* court's reasoning that the Missouri Act **viability-testing** provisions creating a presumption of **viability at 20 weeks** is applicable in upholding the California Attorney General's Opinion 82-313, *supra,* that concludes that the proscription against all abortions after the 20th week of pregnancy in the last sentence of section 25953 of the *California Health and Safety Code* is constitutionally enforceable except as to abortions of nonviable fetuses and abortions necessary to preserve the life or health of the mother, 65 Ops.Cal.Atty.Gen. at 267. The *Webster* court, in reversing the Missouri Court of Appeal opinion that the **viability-testing** provision was unconstitutional, noted:

> "('The basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression') [Citation]."
>
> *Webster, supra,* 492 U.S. at 515, 106 L.Ed.2d at 434

With that foundation the *Webster* court then continues, in pertinent part:

> "The viability-testing provision . . . is concerned with promoting the State's interest in potential human life rather than in maternal health. [The section] creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. . . . The District Court found that 'the medical evidence is uncontradicted that a 20-week fetus is *not* viable,' and that '23½ to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists.' . . . But it also found that there may be a 4-week error in estimating gestational age . . . which supports testing at 20 weeks."
>
> *Webster, supra,* 492 U.S. at 515-516, 106 L.Ed.2d at 434

The *Webster* court then comments on the *Roe v. Wade* decision as follows:

> "Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. [Citations.] We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' [Citations.] We think the Roe trimester framework falls into that category."
>
> *Webster, supra,* 492 U.S. at 518, 106 L.Ed.2d at 435-436

The *Webster* court ends its opinion with the observation that:

> "To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases."
>
> *Webster, supra,* 492 U.S. at 521, 106 L.Ed.2d at 438

Based on this it would appear that the conclusion of the California Attorney General's Opinion 82-313, *supra,* is sound law in California: " . . . the proscription against all abortions after the 20th week of pregnancy in the last sentence of section 25953 [*Health and Safety Code*] is constitutionally enforceable except as to abortions of nonviable fetuses and abortions necessary to preserve the life or health of the mother," 65 Ops.Cal.Atty.Gen. 261, 267.

A woman would not have a constitutional right to terminate pregnancy after the 20th week unless the fetus is nonviable or the abortion is necessary to preserve her life or health, presenting a question of fact as to whether an abortion is legal in each specific case. An illegal abortion would meet the District Attorney's definition of a "significant evil."

Additionally, there is a line of cases flowing from *People v. Roberts* (1956) 47 Cal.2d 374 which allows trespass based on the motivation of preserving life if it appears reasonably necessary for that purpose in the following language:

> "The trial court found that the officers reasonably believed that someone inside the apartment was in distress and in need of assistance and that they entered for the purpose of giving aid. [4] Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving

> life or property and reasonably appears to the actor to be necessary for that purpose. [Citations.]"
>
> *People v. Roberts, supra,* 47 Cal.2d 377

Therefore, the question of whether or not abortion is a significant evil in the State of California should be a question of fact and the defense of necessity should not be precluded as a matter of law depriving defendants of the defense of necessity and of review on appeal of the errors they cited if the defense of necessity were available.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the OPINION AND JUDGMENT of the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

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October 30, 1991

APPENDIX A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent vs. CATHERINE JEAN GARZIANO, LOREN GREGORY BROYLES and RAYMUNDO RODRIGUEZ, JR. Defendant/Appellant	NO. APP-2776 Trial Ct. Nos. VE68540, VE68547, VE68551 OPINION AND JUDGMENT (Filed 12/28/90)

The United States Supreme Court opinion in *Roe v. Wade*, (1973), 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 and the California Supreme Court predecessor opinion in *People v. Belous* (1969) 71 Cal.2d 954, compel us to hold that the theoretical defense of "necessity/justification" is not available to the "abortion clinic trespasser."

Catherine Jean Garziano, Loren Gregory Broyles, and Raymundo Rodriguez, Jr., were found guilty of violating Penal Code section 647c, obstructing the movement of any person in a public place, and Penal Code section 416, failing to disperse after being commanded to do so by a public officer. Garziano and Rodriguez were granted probation upon certain terms and conditions, *inter alia*, the service of 10 days in the work release program, the payment of $275 restitution, and that they stay 100 feet away

from the Family Planning Clinic. Broyles refused probation and was sentenced to serve 10 days in the Port Hueneme City jail and 10 days in the work release program plus a fine of $500 and restitution of $275. Actual work release/jail time was stayed pending appeal.

Appellants contend that the trial court committed a series of errors relating to their tendered defense of "necessity/justification". We do not write upon a clean slate in this most sensitive area of the law.[1] Our duty to follow the decisions of the California Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and the decisions of the United States Supreme Court where a federal question is involved (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 quoting 9 Witkin, Cal. Procedure (3d ed.), § 779, p. 750) dictates that we do not reach the merits of appellants' contentions and affirm the judgments.

We view the whole record in the light most favorable to the judgment as is required by the familiar rule governing appellate review (*People v. Johnson* (1979) 26 Cal.3d 557, 575-579) but recognize the principle that our recital

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[1] As indicated by Justice Blackman [sic] in *Roe v. Wade, supra*, at 93 S.Ct 708: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."

of the evidence is necessarily one emphasizing matters which would justify instructions on the tendered defense of "necessity/justification". (*People v. King* (1978) 22 Cal.3d 12, 15-16.) On January 6, 1989 appellants and 17 other protesters entered the lobby of the building of "Family Planning Associates" and blocked the entrance to this clinic which was then open to the public for business including the performance of first trimeste. abortions. Clinic officials asked appellants and the other protesters to leave. These requests fell upon deaf ears even though the clinic's officials indicated that the police would be summoned. The police were in fact summoned and declared the assembly unlawful. When appellants refused to disperse they were arrested.

Garziano's testimony was typical of all three appellants. She had been concerned about abortion for ten years, had participated in other abortion protests, wanted to make known her views concerning abortion, i.e. that it is the killing of an unborn child, and did stand in the front door of the clinic on July 6, 1989 knowing that it would disrupt the clinic's business. She also testified that she made no effort to talk to any of the patients of the clinic on July 6, 1989 and that she refused to leave when commanded to do so by a police officer. The engrossed settled statement on appeal also indicates that appellant Garziano "admitted knowing that the clinic was open to the public, and knew at the point that she refused to leave that she would be led out of the clinic and would not be able to continue her 'rescue' ".

Also by way of defense, Dr. Forest Taft, a medical doctor specializing in gynecology and obstetrics, testified, " . . . that development begins at conception, that a

child in the womb is alive, . . . is a human life worthy of protection . . . [and] that these principles are accepted in medical science today."

Each appellant can be fairly described as an "abortion clinic trespasser." This phrase describes a person who protests and/or attempts to prevent abortion at an abortion clinic by trespassing, or obstructing the movement of any person in a public place who seeks entry to a clinic, or failing to disperse therefrom after being commanded to do so by a public officer.

The trial court submitted the. defense of "necessity/justification" to the jury on the authority of *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 25-26. "The following requirements have traditionally been held to be prerequisites to the establishment and the defense of justification/duress: [¶](1) The act charged as criminal must have been done to prevent a significant evil; [¶](2) There must have been no adequate alternative to the commission of the act; [¶](3) The harm caused by the act must not be disproportionate to the harm avoided; [¶](4) The accused must entertain a good faith belief that his act was necessary to prevent the greater harm; [¶](5) Such belief must be objectively reasonable under all the circumstances; and [¶](6) The accused must not have substantially contributed to the creation of the emergency. [¶]*These determinations are for the trier of fact.*" (Emphasis added.) (*In re Weller* (1985) 164 Cal.App.3d 44, 48; quoting *People v. Pena, supra;* see also 1 Witkin & Epstein (2d ed.) Cal. Criminal Law § 234, pp. 270-271.)

Our inquiry takes us no further than the first prong of the *People v. Pena, supra,* test. The doctrine of *stare*

decisis compels the conclusion that appellants could not introduce any evidence that "the act charged as criminal must have been done to prevent a significant evil" as a matter of law.[2] The trial court, apparently following the italicized portion of *People v. Pena, supra,* erroneously submitted this issue to the jury. Both the United States and California Supreme Courts having held that a woman has a constitutional right to terminate pregnancy; neither appellants, other persons, an impaneled jury, the trial court, nor this appellate court are permitted to "second guess" this determination. (*Auto Equity Sales, Inc. v. Superior Court, supra,* at p. 455; *Elliott v. Albright, supra,* at p. 1034)[3]

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[2] "Under the doctrine of *stare decisis,* all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. (Citations)" (*Auto Equity Sales, Inc. v. Superior Court, supra,* at p. 455; see also *People v. Triggs* (1973) 8 Cal.3d 884, 890-891.)

[3] "A recent law review article cites several policy considerations that lead to the same conclusion:

" 'When a court justifies an illegal act, it creates a new rule of law to govern the same dilemma in the future. In the clinic trespass context, this would mean that all sincere anti-abortion protesters who invaded clinics to prevent abortions would not

(Continued on following page)

A contrary holding allowing an "abortion clinic trespasser" to defend on principles of "necessity/justification" " . . . would lead to incongruous results: [¶]'If

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(Continued from previous page)

be subject to criminal liability. There is even authority that clinic personnel or other persons could not use force to stop these justified actions. This could effectively close all abortion clinics so that women would have no means by which to effectuate their decision. This would occur even though clinic action causes no legal harm. There has never been an application of the necessity defense having such profound effects. The prison escape cases do not provide an adequate parallel since courts treat each case as unique, requiring a specific threat to the particular defendant. In the clinic cases a mere showing that abortions were being performed would be enough to acquit the anti-abortion intruder. Necessity was never meant to be applied in such an abusive manner.

'The doctrine was developed to deal with unusual circumstances – ones never contemplated by the criminal or civil law.

Abortions are not rare occurrences. They are sanctioned by the Constitution and by a substantial portion of society. This is not an area in which the law is silent. When a court applies necessity, its balancing of the harms reflects society's consensus. Necessity is meant to justify action that society would clearly want to exonerate. Trespasses that interfere with constitutional rights do not fall within this purpose.

'Allowing necessity to justify these protests permits defendants to choose which laws they will obey based on their own moral code. This would justify acts of civil disobedience. The fact that these protests are the only means available at the moment to stop the abortion does not change the major purpose of the action which protesters and their lawyers admit is to change the law with regard to abortion. This simply cannot be accepted as a proper use of the necessity defense. [Footnotes omitted]

'Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U.Cin.L.Rev. 501, 514-15 (1979).' " (*Cleveland v. Municipality of Anchorage* (1981) Alaska 631 P.2d 1073, at pp. 1081-1082, fn. 18.)

abortion trespassers are given license to disrupt the activities of abortion clinics and refuse to desist upon being requested to vacate the premises . . . the continuing battle between those who abhor abortion and those who believe it is a private moral decision could well be joined in physical confrontations into which the police and the courts would be rendered unable to intervene . . . [T]he enduring clashes of beliefs in this fractious dispute must be resolved not by physical confrontations at the front line, but rather through the legislative and judicial framework created for the very purpose of undertaking the sometimes formidable tasks of choosing between extreme positions and competing values. (Citation.)' [¶]In short, if necessity were a valid defense at a time when abortion is a constitutionally protected right, the result would be an endless physical and, perhaps a violent impasse." (*State v. O'Brien*, 784 S.W.2d 187, 193, (Mo.App. 1989.)

Appellants cite no federal or state appellate court opinion that approves the "necessity/justification" theory of defense in the abortion clinic trespass context. In fact, as pointed out by respondent, other jurisdictions have expressly rejected it. (See e.g. *Sigma Reproductive Health Center v. Maryland* 467 A.2d 483, 490 et seq. (Md. 1983), collecting the cases; *State v. O'Brien, supra*, at 192-193, fn. 6 (Mo.App. 1989), collecting the cases.) The Alaska Supreme Court has held that such "defense" is inapposite because abortion is not unlawful in the State of Alaska. The threatened harm must be illegal before the theoretical necessity defense can be submitted to a jury. (*Cleveland v. Municipality of Anchorage, supra*, (1981) Alaska, 631 P.2d 1073, 1078-1079.)

In *Roe v. Wade*, (1973), *supra*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147, our United States Supreme Court said" "This right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty in restrictions upon state action as we feel it is or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (93 S.Ct. at p. 727) "A state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment. (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (93 S.Ct. at p. 732.)

In *People v. Belous* (1969), *supra*, 71 Cal.2d 954, 963, our California Supreme Court indicated: "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's

repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

We have no doubt that appellants believed the abortions which they thought they were going to prevent constituted "a significant evil". As previously indicated, however, both the United States and California Supreme Courts have impliedly, if not expressly, held that abortion is not a "significant evil", not an evil at all, and is in fact lawful when conducted consistent with the guidelines articulated. From this premise it follows and we hold that (1) the theoretical defense of "necessity/justification" is not available to the "abortion clinic trespasser" and (2) the trial court erred by submitting this issue to the jury since it has a duty to refuse instructions which have no basis in law. (*People v. Noah* (1971) 5 Cal.3d 469, 477-478; *People v. Gard* (1978) 76 Cal.App.3d 998, 1003; see also *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10)

"The net result of our holding is that, by reason of the trial court's largesse, . . . [appellants were] permitted the opportunity to have the jury acquit . . . [them] because of 'necessity.' . . . [They were] simply not entitled thereto and . . . [they] may not now successfully complain of claimed trial court errors based thereon." (*People v. Morris* (1987) 191 Cal.App.3d Supp. 8, 12.)

The judgments are affirmed. The stays previously issued by the trial court are vacated.

Yegan
KENNETH R. YEGAN, Judge of the Superior Court Appellate Department

I concur:

Soares
ROBERT J. SOARES, Presiding Judge of the Superior Court Appellate Department

I concur in the affirmance of the judgments.

Barbara A. Lane
BARBARA A. LANE, Judge of the Superior Court Appellate Department

DATED: DEC 28 1990

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CATHERINE JEAN GARZIANO, et al., Defendants and Appellants.	2d Crim. No. B056090 (Super. Ct. No. APP2776) (Ventura County) (Filed May 17, 1991)

May persons who commit crimes while demonstrating at a medical clinic that provides abortions, among other things, to its patients, escape criminal responsibility by invoking the defense of necessity? No.

The three appellants in this case were found by a jury to have engaged in criminal conduct while participating in such a demonstration at a family planning clinic. Appellants and their fellow demonstrators were successful in preventing the clinic from conducting its normal business during the demonstration.

Each appellant testified that his or her conduct was aimed at preventing any woman from obtaining an abortion. They claim their moral convictions on the subject of abortion justifies their criminal behavior. Their avowed

purpose was to impose their beliefs on all others and to interfere with any pregnant woman's right to make her own decision on whether to interrupt the pregnancy no matter at what stage of the pregnancy. The position appellants take is that they may commit crimes with impunity because of the moral correctness of their convictions about abortion. We disagree.

When a person commits a criminal offense, he or she must suffer the penal consequences. A rare exception to this principle arises under the court created defense of necessity. However, the defense of necessity has no application to abortion Protesters who commit crimes to achieve their stated goals of preventing all abortions.

The necessity defense has been recognized in appellate court decisions in California despite the absence of any statutory articulation of this defense and rulings from the California Supreme Court that the common law is not a part of the criminal law in California. (See, e.g., *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632.)

In *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831-832, the court applied the doctrine of necessity to a prison escape case. Among the stringent rules required for the application of the defense of necessity in a prison escape case are: the prisoner must be faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; there is no time for a complaint to the authorities or there exists a history of futile complaints which make any right of making such complaints illusory; there is no time or opportunity to resort to the courts; there is no evidence of force or

violence used toward prison personnel or other "innocent" persons in the escape; and the prisoner immediately reports to the proper authority when he has obtained a position of safety from the immediate threat.

In *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, the court discussed the defense of necessity as it applied outside a prison escape setting. In such a setting, the court held: "1. The act charged as criminal must have been done to prevent a significant evil; [¶] 2. There must have been no adequate alternative to the commission of the act; [¶] 3. The harm caused by the act :must not be disproportionate to the harm avoided; [¶] 4. The accused must entertain a good-faith belief that his act was necessary to Prevent a greater harm; [¶] 5. Such belief must be objectively reasonable under all the circumstances; and [¶] 6. the accused must not have substantially contributed to the creation of the emergency.. (*Id.*, at pp. 25-26, fns. omitted.)

We consider the *Pena* court's articulation of the factors in the defense of necessity to be excessively expansive. However, even under the broad standards of *Pena*, appellants, as a matter of law, were not entitled to have the jury instructed on the defense of necessity. There is no justification for appellants to commit crimes for the purpose of interfering with the exercise by others of their constitutional rights.

The California Supreme Court in *People v. Belous* (1969) 71 Cal.2d 954, held that it is a woman's fundamental right to choose whether to bear children based upon her right of privacy in matters relating to marriage, family and sex. This right of privacy protecting a woman's

right to choose existed even prior to it being enumerated in the California Constitution.

In 1972, the people of the State of California added the right to "privacy" to the other inalienable rights of individuals enumerated in article I, section 1 of the California Constitution. Under this constitutional section, the state has no authority to prohibit woman [sic] from exercising their right to make Procreative choices as they see fit. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 263.)

In *Roe v. Wade* (1973) 410 U.S. 113, 153, the United States Supreme Court held that the right of privacy, " . . . whether it be founded in the Fourteenth Amendment's concept of personal liberty in restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The United States Supreme Court has defined a woman's right to choose as an aspect of the privacy right in very explicit terms: "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 453.) The constitutional right of Privacy is " . . . clearly among the most intimate and fundamental of all constitutional rights." (*Committee to Defend Reproductive Rights v. Myers, supra,* 29 Cal.3d at p. 275.)

Appellants may not criminally interfere with the exercise of constitutional rights by others, and then

escape punishment for their criminal conduct by asserting the defense of necessity. Those who choose to break the law under such circumstances because of firmly held beliefs must be prepared to suffer the consequences.

A pregnant woman's decision to exercise her right under the Constitutions of the United States and of the State of California to terminate a pregnancy is not and cannot be held to be a "significant evil."

All of appellants' issues on appeal relate to their position of the right to assert the defense of necessity. They have no such right.

The judgments of conviction are affirmed.

CERTIFIED FOR PUBLICATION

ABBE, J.*

We concur:

STONE, P. J.

GILBERT, J.

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* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX C

Second Appellate District, Division Six,
No. B056090 S021457

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Aug. 21, 1991)

THE PEOPLE, Respondent

v.

CATHERINE JEAN GARZIANO, Appellant

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS
Chief Justice

APPENDIX D

The constitutional guarantees of jury trials in criminal cases reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought for unlawful purposes.

The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him a great safeguard against improperly motivated court officials. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge he was to have it. Beyond this, the jury trial provisions in the constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust powers over the life and liberty of the citizen to one judge. Fear of unchecked power found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the nation to the right of jury trial qualifies for protection as a matter of due process, and must therefore be respected.

Of course jury trial has its weaknesses and the potential for misuse. There is debate among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in trials. The debate has been intense, with powerful voices

on either side. At the heart of the dispute have been assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable and little better than a role of dice. I believe that juries do understand the evidence, and do come to sound conclusions in nearly all the cases presented to them; and that when juries differ with the result at which a judge would have arrived, it is usually because they are serving some of the very purposes for which they were created.

I have instructed you on the rules of law which may be applicable in this case, depending on the testimony you accept. You gave me your oath to follow the rules of law, and I expect you to honor your oath.

I have had, however, some concern that you might decide this case for reasons not found in the instructions of law. The general term for this sort of juror misconduct is jury nullification. Jury nullification is as illegal as the crime it excuses, if the verdict is not guilty, and it is every bit as wrong. Jury nullification which results in an unlawful guilty verdict must be condemned as well.

Jury nullification happens when jurors decide cases based, for example, on things like fear; sympathy; racial, ethnic, or religious bias; desires by jurors to change an unpopular law; or a decision to express some generalized hostility toward authority. Jury nullification usually comes about when one side or the other has done something inflammatory in court, or where the trial judge has allowed something unusually prejudicial to be introduced as evidence, or where the community is virtually united against the particular law sought to be enforced in court.

The actual laws sought to be enforced in this case are the laws against trespass, and the laws requiring people to disperse upon lawful police order. I think the community is united in favor of those laws, not against them, so I do not actually worry you will rise up against them as jurors.

Further, in this trial I have tried to restrain the parties, and to insulate you from the kinds of material that might incline you towards deciding this case outside the law – that is, I have tried to set this case in a posture which will allow you to make a fair, open-minded, and lawful, decision.

I think it is in that posture. The prosecution evidence was pretty straightforward in its recitation of facts to support the elements of the offenses charged. The defense case was pretty clear too, and raised some issues for you to consider.

Defendants raise the defense of justification, asserting their actions in both trespassing and refusing to disperse were legally necessary as that defense is defined. I told you the six elements of that defense. You have to decide that issue separately for each defendant, on each charge.

There is a part of one element of the justification defense which I do not think the law adequately defines for you. The first element of the defense requires that the acts of the defendants be necessary to prevent some significant evil. The term "significant evil" is not otherwise defined anywhere in the law. One side of this case would have me to define it strictly as anything which is against the law; the other side would have me define it

broadly as anything which is immoral or against some interest of society. I believe this is a definition, the specific content of which must be left to you, the jury. I will tell you, though, that the defense of justification was created by judges; that judges deal mostly with the specific, written law and are not much given to consideration of metaphysical concepts of morality or societal interests. I personally incline to the view it must refer to preventing a harm which is against the law, which abortion is not.

Another issue for you to decide is whether the justification defense is applicable to both charges. There are, I think, significant differences, both factual and legal, between the charges. This is particularly so if you analyze the required subjective and objective reasonableness of defendants' beliefs at particular times during the incident.

It has occurred to me that I ought to instruct you as a matter of law that you may not consider the justification defense on Count 2, the charge of failing to disperse. For the defense to be appropriate on that charge, you have to find it was objectively reasonable to believe that during the brief interval where Velez and LaFata were confronting the defendants one at a time some imminent harm could be prevented; and further, you have to believe the defendants actually and in good faith believed that. To me it doesn't seem reasonable to believe, that at that point further refusal to leave was likely to accomplish anything except an arrest.

However, as I stated at the beginning of these remarks, I have great respect for, and trust in, the jury system. In fact, I have only commented on the evidence in

two other cases in over 100 jury trials. If I removed the justification defense from your consideration on Count 2, it would effectively be removing the only significant issue on that charge from your consideration, and would significantly detract from the jury's independent verdict.

I do not propose to remove any issues from your independent judgment in this case, even where it seems unlikely to me that the justification defense is factually applicable to Count 2. The law is that defendants are entitled to an instruction on their defense, even where the supporting evidence is weak or of doubtful credibility, and I propose to follow the law. What I ask is that you follow the law too, and only convict or acquit if you find it in the law.

This concludes my personal comments. You are reminded again that they are advisory only, and are not binding on you, and you may reject them or accept them as you wish, in reaching your independent decision on the case.